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APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

FILE NO. 76-294

JULIAN H. ADAMS

APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HON. L. T. GRANT, JUDGE

COMMONWEALTH OF KENTUCKY

APPELLEE

BRIEF FOR APPELLEE

ROBERT F. STEPHENS
ATTORNEY GENERAL

B. F. RADMACHER, III
ASSISTANT ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601

PATRICK H. MOLLOY
COMMONWEALTH'S ATTORNEY
22th Judicial District

COUNSEL FOR APPELLEE

FILED

SEP 8 1976

MARTHA LAYNE COLLINS
CLERK
SUPREME COURT

I hereby certify that a copy
of the foregoing Brief for
Appellee has been mailed,
postage prepaid, to the Hon.
L. T. Grant, Judge, Fayette Circuit
Court, Fayette County Courthouse,
Lexington, Kentucky 40507;
the Hon. Patrick H. Molloy,
Commonwealth's Attorney, 22nd
Judicial District, Lexington,
Kentucky 40507; and the Hon.
J. Vincent Aprile II, Assistant
Public Defender, 625 Leawood
Drive, Frankfort, Kentucky 40601,
this 8th day of September, 1976.



Assistant Attorney General

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APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF THE QUESTIONS PRESENTED

I

WHETHER SENTENCING IS A CRITICAL STAGE OF
CRIMINAL PROCEEDINGS IN KENTUCKY AND
WHETHER THE INTRODUCTION OF A JUDGMENT
WHICH DOES NOT INDICATE REPRESENTATION
BY COUNSEL AT SENTENCING DENIED THE
APPELLANT DUE PROCESS?

II

WHETHER THE TRIAL COURT SHIFTED THE BURDEN
OF PROOF TO THE APPELLANT RELATIVE TO THE
CONSTITUTIONAL VALIDITY OF HIS PRIOR
FELONY CONVICTION?

III

WHETHER SUFFICIENT COMPETENT EVIDENCE WAS
INTRODUCED TO SUSTAIN THE JURY'S DETER-
MINATION THAT THE APPELLANT WAS 18 YEARS
OF AGE WHEN HE COMMITTED THE OFFENSE
WHICH WAS THE SUBJECT OF HIS 1941
CONVICTION?

COUNTERSTATEMENT OF THE CASE

The appellee accepts as substantially correct appellant's statement of the case, insofar as it is relevant to the issues presented herein and not otherwise controverted or restated. Further, any additional reference to the Transcript of Evidence or Transcript of Record shall be noted as appropriate, and shall be indicated as "TE" and "TR".

The appellee states that the testimony of the appellant relevant to legal representation during the trial and sentencing of his 1941 conviction more accurately indicates that he is almost certain counsel was not present at sentencing (TE pp 317, 319).

ARGUMENT

I

SENTENCING IS NOT A CRITICAL STAGE OF THE PROCEEDINGS IN KENTUCKY, THEREFORE, THE INTRODUCTION OF A JUDGMENT WHICH DOES NOT INDICATE REPRESENTATION BY COUNSEL AT SENTENCING DID NOT DENY THE APPELLANT DUE PROCESS.

The appellant contends that at the time of sentencing, for his 1941 conviction of voluntary manslaughter, he was not represented by counsel. The thrust of the appellant's argument is that since he was not represented at sentencing his sentence is void and cannot be utilized to find him an habitual criminal. The appellant relies on Losieau v. Sigler, 406 F.2d 795 (8th Cir., 1969) and Oliver v. Cowan, 487 F.2d 895 (6th Cir., 1973), in support of his argument.

The appellee submits that the argument of the appellant completely disregards the decisions of this Court. Recently, in Steenbergen v. Commonwealth, Ky., 532 S.W.2d 766 (1976) this Court stated:

"...This court has rejected the cloak of sanctity imposed by Oliver. In plain language not subject to misinterpretation, the court has held that the guiding hand of counsel is not required in formal sentencing procedures because it is not a critical stage of the proceeding. This is particularly so when the accused has shown no prejudice in order to be entitled to the relief sought...." at p 767.
(Emphasis supplied)

Also see King v. Commonwealth, Ky., 487 S.W.2d 683 (1972) and Thomas v. Commonwealth, Ky., 437 S.W.2d 512 (1969).

At trial, and in response to the question, "Do you

recall whether or not you had an attorney present at that time?" (Transcript of Evidence, hereinafter cited as "TE" p 318, line 13). The appellant responded "I don't think I did at that time, sir. I had an attorney during the trial." (TE p 318, line 13). Later the appellant stated "No, there was no attorney present there that day." (TE p 318, line 14). Finally, the appellant stated "I'm almost positive he wasn't." (TE p 319, line 18).

The appellant did not state in absolute terms that counsel was not present at sentencing. Further, the appellant has not shown prejudice resulting from lack of counsel.

In Reams v. Commonwealth, Ky., 522 S.W.2d 853 (1975) this Court stated:

"...that it is not bound by Oliver and does not accept the principles enunciated therein as sound in the absence of a showing or prejudice. To set aside a judgment upon such a technical ground without even an allegation that the defendant had a reason why it should not have been pronounced would, it seems to us, be absurd." at p 854.

In the present case, there is no allegation of prejudice by lack of counsel at sentencing. Further, the judgment has stood unchallenged for 35 years and without a showing of prejudice by the appellant, his allegation, if true, does not require that the sentence be held void. Finally, even if sentencing were a critical stage of the proceedings the judgment would not be void, only the sentencing.

The appellee submits that the law of Kentucky is clear and sentencing is not a critical stage in the proceedings, and lack of counsel at sentencing does not invalidate the sentence.

Finally, the appellant's testimony does not establish that he was not represented.

II

THE TRIAL COURT DID NOT SHIFT THE BURDEN OF PROOF TO THE APPELLANT, THEREBY DENYING HIM DUE PROCESS.

The appellant contends that the trial court committed reversible error when it shifted the burden of proof to him to show he did not have counsel. The appellee contends that the prosecution proved the 1941 conviction and the trial court did not shift the burden. The Court required the appellant to assert under oath that he did not have counsel, nothing more. The Court stated:

"THE COURT: I'm going to let him introduce them, and if your people want to take the stand and say they were not represented by counsel, then you're out."
(TE p 300)(Emphasis supplied)

The appellee contends that the procedure suggested by the trial court did not shift the burden to the appellant. The trial court stated explicitly that if the appellant stated that he was not represented by counsel then the habitual charge could not stand. The appellant only had to take the witness stand and assert lack of counsel. Clearly, the burden of proof did not shift. The Court merely required the appellant to put the question of representation of counsel into issue. The discussion of the Court and attorneys of record indicates that once the appellant stated he was not represented, the state had to prove representation. The Court stated that the defendants would

be "out" because the prosecutor had nothing to prove representation (TE p 300).

In the present case, the appellant took the witness stand and admitted the presence of counsel during trial. Further, the appellant was not absolutely certain that counsel was not present at sentencing (TE pp 317, 318). The appellee submits that the testimony of the appellant cured any defect in the record of his 1941 conviction. The appellant dispelled any question as to the constitutionality of his conviction and sentencing.

The appellant argues that the state may not presume constitutional validity from a silent record, Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967). Further, that the appellant need not put into issue lack of representation or any other defect in the judgment. The appellee submits that the trial court did not reach such a presumption and contends that the appellant should not be allowed to rely on defects in the record through his silence. The appellant does not argue that he was not represented by counsel only that the record was defective. Obviously, such ancient records oftentimes do not meet all of the requirements established in the last 35 years, nor could the courts or clerks of 1941 be expected to anticipate the developments in criminal law during that span of time. The appellee contends that such ancient records, uncontroverted for 35 years should not be subject to attack by the mere silence of the appellant.

This trial court clearly indicated that the evidence of the record would be excluded if the appellant stated under oath he was not represented and the appellee contends that such a requirement was reasonable. Further, since the appellant admitted representation, no prejudicial error ensued by the introduction of the records or the Court's decision.

The appellant has cited Losieau v. Sigler, 406 F.2d 795 (8th Cir., 1969) in support of his contentions. Losieau was a habeas corpus action and the Circuit Court stated:

"...We are inclined to believe that Burgett must be read as holding that where the record is silent as to whether an accused was furnished counsel at a critical stage and where the accused introduces evidence tending to show that he was not in fact so represented, the burden then shifts to the state to prove, by a fair preponderance of the evidence, that the accused was represented. See United States ex rel. McCloud v. Rundle, 402 F.2d 853 (3rd Cir., 1968)." (Emphasis supplied)

The Court required Losieau to do more than introduce the silent record, it required him to submit proof that he was not represented. While the Losieau decision is relative to a habeas corpus action the appellee submits that it lends a proper perspective to the Supreme Court's decision in the Burgett citation. In Ingram v. Wingo, 310 F.2d 1032 (1971), the United States District Court stated:

"...In view of the uncontradicted allegations of the petitioner, and the silent record as to the presence of counsel, it is the judgment of this court that the petitioner's habitual criminal conviction is unconstitutional and void. Williams v. Coiner, 392 F.2d 210 (4 Cir. 1968);

Losieau v. Sigler, supra; and United States ex rel. Easterling v. Wilkins, 303 F.2d 883 (2 Cir. 1962)." (Emphasis supplied)

In each of the above cases the appellant was required to assert something in addition to a silent record to **shift the burden to the state and merit habeas corpus relief**. In Ingram v. Commonwealth, Ky., 427 S.W.2d 815 (1968), this Court required no more of the appellant.

"...The record of the last trial reveals that the clerk of the court produced the two judgments, each showing the conviction, but neither of them indicated whether the defendant was or was not represented by counsel. Counsel for appellant did not interrogate the clerk nor did he introduce any evidence to show lack of counsel. We must presume that '* * *the proceedings were correct and the burden rests on the accused to show otherwise.'" (Citations omitted).

The Ingram case was a direct appeal and this Court required the appellant to affirmatively put into issue his claim of lack of counsel. In the present case, the appellant did object to the introduction of the record but his subsequent testimony negates the possibility of prejudice.

In McHenry v. Commonwealth, Ky., 490 S.W.2d 766 (1973), which was a belated appeal of a 1966 conviction under KRS 431.190, this Court placed the burden on the appellant to show that the prior conviction was unconstitutionally imposed. Further, the Court reaffirmed its decision as stated in Ingram.

The appellee submits that the law of Kentucky clearly requires the appellant to put into issue his constitutional claim of lack of counsel during trial. Further, the case

law indicates that something more than an objection is necessary. The Ingram and Losieau cases, which deal with habeas corpus, also indicate that the petitioners were required to submit more than the silent records to merit habeas corpus relief in the Federal Courts.

The appellant's argument that he was denied due process by the trial court is without merit. The appellant was not forced or coerced to take the witness stand nor did the trial court require that he submit proof of **non-representation** to overcome the 1941 record.

The appellant's testimony as to representation by counsel in the 1941 proceeding cures any defects in the judgment and records previously introduced. Finally, since the appellant admitted representation of counsel the introduction of the record was non-prejudicial and the conviction is valid.

III

THE PROSECUTION INTRODUCED SUFFICIENT
COMPETENT EVIDENCE RELATIVE TO THE
APPELLANT'S AGE AT THE TIME OF THE OFFENSE
TO SUSTAIN HIS CONVICTION UNDER KRS 532.080.

The appellant contends that the evidence elicited at trial did not prove that he was 18 years of age at the time he committed voluntary manslaughter in Pike County, Kentucky for which he was convicted in 1941. The appellee submits that the record and evidence introduced were sufficient to prove the age of the appellant and were uncontroverted at trial. The judgment introduced was dated September 25, 1941 and the record of incarceration

from the State Reformatory at LaGrange showed a birth date of May 24, 1920 (TE p 354). At the time of his conviction the appellant was over 21 years of age.

The appellant's reliance on Burgett v. Texas, supra, is misplaced. The Burgett decision does not hold that a silent judgment is improper as evidence for all purposes. The appellee submits, that the date of the judgment and the record of the State Reformatory at LaGrange (TE p 354) are sufficient to prove the age of the appellant on the date of his conviction. The records introduced into evidence clearly establish that on September 25, 1941, the appellant was over 21 years of age. Further, the appellant testified that on the day of sentencing he was 19 or 20 years old (TE p 319).

The appellee submits that the evidence was sufficient to submit the case to the jury. Further, the age of the appellant, like any other element of an offense can be proved by circumstantial evidence. The appellant's allegation that the evidence introduced does not support an inference that the appellant was over the age of 18 at the time of the offense is patently incorrect. Further, the appellant did not allege that he was under the age of 18 during trial.

The appellee submits that the judgment of conviction was competent evidence establishing the date of conviction and with the proof of the appellant's birth date established the age of the appellant on the date of his conviction.

Further, the evidence was sufficient to sustain the jury's determination that he was over 18 years of age at the time of the offense and did not shift the burden of proof thereby denying the appellant due process. Finally, the appellee submits that the appellant had a duty to assert his minority as an affirmative defense of KRS 532.080.

CONCLUSION

The Supreme Court of Kentucky has clearly and unequivocally stated that sentencing is not a critical stage of the criminal proceedings. Further, without a showing of prejudice the Court will not invalidate a conviction based on lack of counsel at sentencing. The appellant was not denied due process by the introduction of the record of his 1941 conviction.

The trial court did not shift the burden of proof to the appellant during his trial as an habitual criminal. The Court clearly stated that the state had to prove assistance of counsel in the appellant's 1941 conviction if the appellant denied assistance. Finally, since the appellant admitted representation by counsel the introduction of the record and the Court's decision were not prejudicial or at worst harmless error. Since the appellant admitted the assistance of counsel, the case of Burgett v. Texas, supra, and references to the silence of the record are of no consequence.

The appellant's contention that there was insufficient evidence of his age at the time of the offense is without merit. Further, the appellant did not contro-

vert the fact that he was 18 during his testimony at trial. If, this Court should find error, the appellant should be resentenced under the principal conviction of First Degree Robbery.

The appellee submits that the conviction of the appellant must stand.

Respectfully submitted,

ROBERT F. STEPHENS
ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read "B. F. Radmacher, III", with a horizontal line extending to the right.

BY: B. F. RADMACHER, III
ASSISTANT ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601

COUNSEL FOR APPELLEE